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9 UNITED STATES BANKRUPTCY COURT
10 FOR THE DISTRICT OF OREGON

11 In Re:) Bankruptcy Case
12 SCOTT B. DUFFUS and) No. 05-75085-fra7
13 WENDY K. DUFFUS,)
14 _____) MEMORANDUM OPINION
Debtors.)

15 The Trustee has filed a motion for an order dismissing this
16 case pursuant to 11 U.S.C. § 521(e)(2)(B). The Court finds that the
17 motion should be denied.

18 I. FACTS

19 The Debtors' petition for relief was filed on December 28,
20 2005. The first meeting of creditors (Code § 341(a)) was scheduled for
21 January 27, 2006, and notice to that effect was issued by the Court and
22 served on the Debtors and their attorney on December 28.

23 The Debtors, through their attorney, delivered a copy of their
24 last tax return to the Trustee four days before the § 341(a) meeting.
25 The Trustee filed a motion to dismiss the case, because the returns were
26 // // //

1 not provided seven days prior to the § 341(a) meeting as the statute
2 requires.

3 As it happens, the returns were in the Debtors' attorney's
4 possession from the time of their initial meeting, and in enough time to
5 make a timely delivery to the Trustee. The Debtors assert that they had
6 done all they could do to ensure delivery, and should not be penalized by
7 the attorney's oversight.

8 In his motion, the Trustee notes that he "[does] not advocate
9 for dismissal," and that he has identified possible assets for
10 distribution.

11 II. DISCUSSION

12 Code § 521(e) was added by the Bankruptcy Abuse Prevention and
13 Consumer Protection Act of 2005. It provides at § 521(e)(2) that:

14 (A) The debtor shall provide -

15 (I) not later than seven days before the date
16 first set for the first meeting of creditors, to the
17 trustee a copy of the federal income tax return
18 required under applicable law (or at the election of
19 the debtor, a transcript of such return) for the most
20 recent tax year ending immediately before the
21 commencement of the case, and for which a federal
income tax return was filed; and

22 (ii) at the same time the debtor complies with
23 clause (I), a copy of such return (or if elected under
24 clause (I) such transcript) to any creditor that
timely requests such copy.

25 (B) If the debtor fails to comply with clause (I) or
26 (ii) of subparagraph (a), the court shall dismiss the
case unless the debtor demonstrates that the failure
to so comply is due to circumstances beyond the
control of the debtor.

Both parties agree that there are assets available to the
estate for distribution to creditors. Nevertheless, the Trustee

1 maintains that he has no choice but to file the motion.¹ The Trustee is
2 mistaken. Where, as here, dismissal is contrary to the interest of the
3 estate and of creditors, the Trustee has the authority to waive an
4 untimely delivery of documents simply by declining to file a motion.

5 There is substantial authority that trustees have such
6 "prosecutorial discretion." See Society Bank v. Sinder (In re Sinder),
7 102 B.R. 978 (Bankr. S.D. Ohio 1989), Larson v. Munoz (In re Munoz), 111
8 B.R. 928 (D. Col. 1990), In re. V. Savino Oil & Heating Co., Inc., 91
9 B.R. 655 (Bankr. E.D.N.Y. 1988). While most of the cases involve the
10 initiation of adversary proceedings, the same principle applies here. It
11 is the Trustee's principal duty to accumulate assets for distribution to
12 creditors. This obligation is not necessarily trumped by a perceived
13 duty to police every aspect of the case.²

14 This is not inconsistent with the structure of the Code, as
15 amended by BAPCPA. The ordinary predicate for any order is a motion. F.
16 R. Bankr. P. 9014.³ This applies to nearly every proceeding which may
17 result in dismissal. See, e.g. Code §§ 707, 1112, 1208, 1307. Where
18 the Congress intended that a case be dismissed automatically, and without
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21 ¹ The Court wrote to the parties, and to the U.S. Trustee, asking them to comment
22 on the issue of whether a trustee has the discretion to decline to file a motion to
23 dismiss. There was no substantial response to the Court's inquiry. Particularly
disappointing is the U.S. Trustee's failure to comment one way or the other. Neither
the Trustee nor the U.S. Trustee appeared at the hearing.

24 ² In fact, given the structure of the modern Code, it may be argued that the
25 policing duty has been shifted by the Congress to the U.S. Trustee. See 11 U.S.C. §
307.

26 ³ The Rule provides that "In a contested matter not otherwise governed by these
rules, relief shall be sought by motion...."

1 the need for a motion, it said as much. See § 521(i)(1)⁴

2 Application of the wrong legal standard in the exercise of
3 discretion constitutes an abuse of that discretion. Cf. In re Beatty,
4 162 B.R. 853, 855 (BAP 9th Cir. 1994). The Trustee failed to consider
5 the estate's interest in determining whether or not to file his motion,
6 in the erroneous belief that such interest could not be taken into
7 account. Accordingly, the motion should be denied.

8 The foregoing constitutes the Court's findings of fact and
9 conclusions of law. An separate order denying the trustee's motion will
10 be entered.

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12 FRANK R. ALLEY, III
13 Bankruptcy Judge
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25 ⁴ § 521(i)(1): "...if an individual debtor in a voluntary case under chapter 7 or
26 13 fails to file all of the information required under subsection (a)(1) within 45 days
after the date of the filing of the petition, the case shall be automatically dismisses
effective on the 46th day after the date of the filing of the petition."